JAMES H. GEARY
6191 North 37th Street
Richland, Michigan 49083-9681

April 30, 2003

Corbin R. Davis, Clerk
Michigan Supreme Court
PO Box 30052
Lansing MI 48909

RE: ADM File No. 2002-34 – Comment

Dear Mr. Davis:

I was admitted to the Bar 30 years ago. I've spent most of my professional career involved in appeals.

Reducing the time in which to file briefs in the Court of Appeals is unnecessary and ill advised. The proposed changes will increase the expense to litigants. They will inevitably reduce the quality of briefing. Shortening the briefing schedule will do nothing to address the most substantial cause of delay in the appellate process, which is the lack of adequate staffing and funding provided by the Legislature to the Court of Appeals.

I frequently file briefs without seeking an extension. On other occasions, the 28-day extension currently provided makes it possible to balance a difficult workload, to spend more time on a particularly complex case or to deal with family or business emergencies.

Nearly everything a lawyer involved in litigation and appeals has to do is on a deadline. Generally speaking, matters in trial courts tend to be more urgent than matters on appeal. Lawyers typically have little control over the deadlines they face. Some matters have to be attended to instantly, like seeking or opposing a temporary restraining order. Other matters, like a great many civil appeals, are important to clients, but do not involve matters of special urgency. The flexibility provided by the current deadlines for filing briefs on appeal, and for automatic extensions or extensions on motion, make it possible for practitioners to provide effective, timely and economical services to their clients by adjusting schedules when necessary.

One of the great unresolved mysteries of the practice of law is why all important matters having a short deadline come due at the same time. Unfortunately, experienced appellate practitioners, legal secretaries, paralegals, typists and all the other people necessary to turn out a good appellate brief can't be found on short notice. If they could be hired from temporary agencies, a law firm with two or three or four briefs all due the same week could hire staff, meet the proposed shorter deadlines and then lay people off during the relatively slack period to follow. That can't be done.

Appellate lawyers get to be good appellate lawyers by doing appeals on a regular basis. That requires having a number of pending matters on hand at the same time. It also requires the ability to adjust the workload through extensions of time and otherwise. One possible result of the shortened deadlines will be to require experienced appellate practitioners to take fewer appeals at any given time. That means, necessarily, that less experienced practitioners will be handling those appeals and that the litigants, for whose benefit the system is supposedly run, will not get their first choice of appellate counsel. It may also increase the cost to each client for an appeal. Dramatically shortened deadlines will mean that firms doing a large appellate practice will either have to hire additional staff and pay them during slack times or take fewer appeals. If the firms take fewer appeals, then in order to maintain the same level of annual income, the cost per appeal will have to go up. If additional staff is hired to get firms through exceptionally busy times or if overtime has to be paid to clerical staff, that cost, ultimately, will be passed on to the litigant.

All of that might be acceptable if the proposed reductions did anything to get cases decided more quickly. They won't. Chief Judge Whitbeck and many others have repeatedly and correctly observed that a lack of staffing at the Court of Appeals makes impossible a prompt resolution of cases as soon as they are fully briefed. At a minimum, the Court of Appeals needs more research attorneys. It probably can use more appellate judges. It will get neither without the cooperation of the Legislature. It takes money to run an effective Court of Appeals. Until the Court gets that money, and the staffing that will come with it, there will be no significant reduction in the time it takes to get cases decided.

At a minimum, it would be worthwhile postponing implementation of the proposed shorter briefing deadlines until the Court of Appeals is able to reduce the amount of time that cases spend "in the warehouse" after briefing and before oral argument. If the main source of delay is eliminated, we will have time enough to consider further reductions.

Reviewing the record in a complicated case takes time. As a matter of good appellate practice, many litigants and appellate firms have a lawyer other than the one who tried the case review the record and handle the appeal. A fresh set of eyes helps weed out cases that ought not to be appealed. Generally, it makes for more thoughtful analysis of the issues that are appealed. However, it also requires that a new lawyer take the time necessary to familiarize himself or herself with the record and the legal issues involved.

Appellate research is almost always more thorough than research done in the trial courts. That takes time. Issues of first impression usually take longer than other matters. To be sure, there are some "cookie cutter" appeals with briefs that can be cranked out quickly. Those briefs usually are cranked out quickly. However, court rules that require motions and briefing to obtain extensions will do little than to add expense to the litigants who will have to pay the cost of writing those motions and briefs in the cases that do require an extended period of time to prepare. It will make more work for the Court of Appeals, which will have to decide the motions for extensions of time that are currently automatic.

I have had complex and difficult cases in which the briefs ultimately filed have been edited more than 20 times before being filed. Typically, the clients want to review each draft. All of that takes substantial time. Certainly, many briefs can be and are drafted in less time than currently provided by the court rules, even without the extensions currently provided. Even difficult and complex briefs can be, and frequently are, filed without an extension if the law office preparing them is not burdened (or blessed) with many other files with deadlines similar to those in the case on appeal. A rule that anticipates that every law firm will always be able to get every brief, or nearly every brief, done in significantly less time than is now available is simply unrealistic. Briefs prepared without ample time for research and reflection are not likely to be as helpful to the Court as the ones it receives now.

Appellate practice involves a great deal of contemplation. Issues that the trial court has to address quickly and without much reflection can be considered much more deliberately at the appellate level. That is one of the supposed advantages to appeals. The Court can take the time necessary to consider legal issues that materially affect the substantial rights of the parties and to get those matters right. I suspect and hope that judges would consider a rule that requires the issuance of a written opinion within 14 or 21 days after oral argument to be absurd. One could argue in support of such a rule that the briefing was complete months before the oral argument and the judges had all they needed to consider before them on the day of oral argument. However, a rule like that would result in hastily written, poorly decided cases. It would be as unwise as truncating the briefing schedule.

A rule requiring even complicated, multi-issue briefs to be drafted, edited and submitted in haste will ultimately detract from the ability of the Court of Appeals to decide the cases coming before it based on a sound analysis of the applicable law.

I respectfully request that the proposed amendments not be implemented.

Sincerely,

James H. Geary (P13892)